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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	**CC Docket No. 96-45**
Universal Service	)	

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To: The Commission

Comments of UTC

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Summary

A growing number of utilities and pipelines have expressed a strong interest in actively providing telecommunications services and products. To the extent that utilities and pipelines enter into the provision of such telecommunications services they fully expect to be subject to the Act's universal service provisions in the same manner as other similarly situated carriers. Indeed, UTC is confident that if the Commission properly structures its rules, the utility industry can play a significant role in the deployment of telecommunications infrastructure and the advancement of universal service.

However, in drafting its universal service obligations the FCC must be careful not to adopt overly broad contribution requirements that could have the unintended consequence of creating a disincentive for continued utility provision of telecommunications infrastructure. Specifically, UTC considers it premature for the Commission to extend universal service contribution requirements to non-telecommunications service providers, including entities that operate as infrastructure providers or carrier's carriers but which do not themselves directly offer service to the public.

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Comments of UTC

Pursuant to Section 1.415 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] hereby submits its comments in response to the *Notice of Proposed Rule Making* (*NPRM*), CC Docket No. 96-45, released March 8, 1996, to implement the universal service provisions of the Telecommunications Act of 1996.[2]

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric which cooperatives serve only a few

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[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] On April 1, 1996, the FCC released an Order, DA-96-483, extending the comment and reply comment deadlines in this proceeding to April 12, 1996, and May 17, 1996 respectively.

thousand customers each. All utilities depend upon reliable and secure communications to assist them in carrying out their public service obligations. In order to meet these communications requirements, utilities and pipelines operate extensive private, internal communications networks consisting of both wired and wireless components.

While many utilities and pipelines intend to take an increasingly active role in the provision of telecommunications services, the vast majority will retain a strong need for private internal communications networks. Therefore, in crafting its universal service rules it is important that the Commission not unduly burden these critical private networks. As the organization that took a lead role in ensuring that the Telecommunications Act of 1996 allowed for and promoted utility entrance into telecommunications, UTC is pleased to offer the following comments.

I. Contribution Requirements Should Not Be Extended Beyond Telecommunications Service Providers

The FCC has adopted the current *NPRM* to implement the universal service directives of the Telecommunications Act of 1996. The principle source of funding for universal service is the imposition of support obligations on telecommunications carriers. As the Commission is aware, a growing number of utilities and pipelines have expressed a strong interest in actively providing telecommunications services and products. Consistent with the Act's dictate that universal service support mechanisms be assessed on an equitable and nondiscriminatory basis, utilities that enter into the provision of such telecommunications services fully expect to be subject to the Act's universal service

provisions in the same manner as other similarly situated carriers. Electric utilities for example, have a strong record of providing universal service, serving a greater percentage of American households than local exchange carriers. UTC is confident that if the Commission properly structures its rules, the utility industry can play a significant role in the deployment of telecommunications infrastructure and the advancement of universal service. Indeed, for many utilities that serve rural areas, economic and infrastructure development are key tenets in their overall corporate charters. In drafting its universal service obligations the FCC must be careful not to adopt overly broad contribution requirements that could have the unintended consequence of creating a disincentive for continued utility provision of telecommunications infrastructure.

A. Definition of Telecommunications Services

In attempting to determine who should contribute to universal service the Commission notes that Section 254(d) of the Act requires that "[e]very telecommunications carrier that provides interstate telecommunications services" contribute to "preserve and advance universal service." The FCC seeks comment on which service providers fall within the scope of the term "telecommunications carriers that provide interstate telecommunications services." The Act includes the following definition of "telecommunications service:"

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

A parsing of this definition indicates that in order to be considered a telecommunications service provider an entity must satisfy two requirements: (1) telecommunications has to be offered for a fee; and (2) the service has to be offered directly to the public, or to such classes of users as to be effectively available directly to the public.

1. Offered For A Fee

The first element of this definition makes it clear that Congress only intended it to apply to commercial telecommunications services; that is, services that are offered for a fee. Thus, for example, utilities and pipelines that rely on private mobile and fixed communications networks to safely manage, control and coordinate, essential services, and which do not offer the use of such communications services to third-parties for a fee are not telecommunication service providers.

In determining whether a service is offered for a "fee," the FCC should look to whether the service is being offered on a for-profit commercial basis. For example, utilities, pipelines and other private system operators often enter into non-profit, cost-sharing arrangements for the construction and operation of private communications networks. Such sharing arrangements have been encouraged by the FCC, particularly in the case of radio-based systems as a means of conserving spectrum. Even though one of the private system owners or operators may receive cost-reimbursement from other users, this does not constitute a "fee" in the sense of being a payment for the rendition of a

communications service. Therefore, the FCC should not consider non-profit, cost-shared systems as offering services for a "fee."

2. Directly To The Public

The second element in the definition of telecommunications service is that the service must be offered "directly to the public or to such classes of users as to be effectively available directly to the public." By adopting this element of the definition, Congress expressed its intent that the determination of whether an entity is acting as a telecommunications service provider should focus on whether the service provider is itself directly offering service to the end-user public.

Inclusion of the alternative phrase, "or services offered to such classes of users as to be effectively available directly to the public," does not alter this analysis, as this clause also looks to whether the service provider is offering service directly to the end user public. The "effectively available" language was included to ensure that providers who offer service to certain broad classes of end users, rather than the public at-large, are included within the scope of the definition. In this way, carriers who directly serve a sufficiently large segment of the public so as to make their service effectively available to a substantial portion of the public are considered telecommunications service providers. This reading is consistent with the Commission's interpretation of similar statutory language contained in the definition of "commercial mobile radio service" (CMRS). A CMRS provider is defined, in part, as one who makes "service available to the public or to such classes of

eligible users as to be effectively available to a substantial portion of the public."[3] The FCC interpreted this language as including carriers that do not limit their offerings to a significantly restricted class of eligible end users.[4] However, unlike the CMRS definition, the new Act's definition of telecommunications service contains an explicit requirement that the provider offers service directly to the public.

Thus, the mere provision of infrastructure, such as "dark fiber" or wholesale capacity to third-party carriers would not be a "direct" offering of service to the public. Of course, an entity leasing such infrastructure or bulk capacity from a carrier's carrier and using it to provide for-profit service directly to the public would be offering "telecommunications service."

The legislative history for nearly identical language adopted by the Senate Commerce Committee in the 103rd Congress further validates this interpretation. The Commerce Committee Report to accompany S.1822, the Communications Act of 1994, explains that:

> The term "telecommunications service" is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity (i.e., "dark fiber") does not fall within the definition of telecommunications service.[5]

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[3] Section 332 (d)(1) of the Communications Act of 1934 as amended by the Omnibus Budget Reconciliation Act of 1993.

[4] Private carriage in the CMRS context is now limited to the provision of service to certain distinct classes of "eligible users." However, under the Act, a private carrier would be an entity that provides communications service on such an individualized basis that it can not be reasonably construed as being "effectively offered directly" to the public.

[5] Report of the Senate Committee on Commerce, Science and Transportation on S.1822, Report 103-367, 103rd Congress 2nd Session, September 14, 1994.

While S.1822 was not ultimately adopted, its definition for "telecommunications services" was incorporated in large part (including the specification that service be offered directly to the public) in to the definition of the Act of 1996.[6]

The exclusion of "carrier's carrier" arrangements from the definition of telecommunications services comports with the overall intent of the Act to encourage additional facilities based competition. By allowing entities such as utilities and pipelines to act as infrastructure providers on a non-regulated basis, new services and competitors can be introduced in the marketplace.[7] Third-parties that utilize leased capacity to provide commercial telecommunications services directly to the public, would, themselves be considered telecommunications service providers. For example, an interexchange carrier, cable company or competitive access provider that leases "bulk" utility capacity in order to provide service directly to the public falls within the definition of a telecommunications service provider and therefore would be subject to the Act's universal service obligations; whereas entities which only provides access to telecommunications capacity on a "wholesale" basis to third-party carriers would not be subject to those obligations.

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[6] S.1822 contained the following definition for telecommunications services: "[T]he direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services .

[7] The FCC's 1992 Fiber Deployment Report notes that utilities already provide over 100,000 fiber miles to interexchange carriers helping to promote competition and allowing for more reliable service through the supply of alternate routing.

Based on the above analysis, the Act would presumptively impose universal service support obligations on telecommunications carriers that offer service directly to a substantial class of end users. Included in this definition would be interexchange carriers, local exchange carriers, competitive local exchange carriers and CMRS providers. Entities operating only private communications systems, systems operated on non-profit, cost shared basis, or providing only infrastructure, "carrier's carrier" service or service to only a discrete class of end users are not telecommunications service providers, and would not be presumptively subject to the universal service support obligations.

B. Other Telecommunications Providers

In addition to the Act's mandate that all telecommunications service providers contribute to universal service, the new law also provides that "[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." The Commission seeks input on whether it should extend universal support obligations to other providers of interstate telecommunications.

Given the fact that the Act describes universal service as "an evolving level of telecommunications services that the Commission shall establish periodically..., taking into account advances in telecommunications and information technologies and services," UTC considers it premature for the FCC to extend contribution requirements to non-telecommunications service providers. The FCC is not yet in a position to know whether

assessments on telecommunications service providers alone will be sufficient to meet universal service support requirements. Considering the ever-growing number of competitive entrants into the provision of telecommunications services it is very likely that no additional contributions will be necessary.

Under no circumstances should the FCC consider the imposition of universal service support obligations on the operators of private telecommunications networks that are used for the provision of essential public services. For example, as noted above, utilities and pipelines rely on sophisticated private communications networks as a necessary tool to ensure reliable, safe and efficient delivery of service to the public. These privately owned and maintained telecommunications systems allow for efficient day-to-day service and more timely restoration of critical service then could be provided if utilities and pipelines were forced to rely entirely on third-party communications providers. Further, the unique operational aspects of utility and pipeline service -- critical time delay parameters; transmission of volatile substances; and expansive or remote operating territories -- necessitate the use of internal communications systems.

The imposition of a universal service contribution requirement on the operators of vital private communications networks would be contrary to the public interest. A funding obligations would constitute an unnecessary tax that would ultimately have to be absorbed by the ratepaying consumers. Aggravating the inequity of such an obligation is the fact that many of these private systems are required by Federal, state and local laws and statutes for the safe operation of utilities and pipelines. Moreover, since many of these

communication systems serve unique functions not offered by commercial carriers, such as protection of the electric grid or monitoring of pipeline valve pressure, it cannot be argued that the private operation of these systems negatively impacts the funding of public networks.

In addition to not extending contribution requirements to operators of purely private internal communications networks, the Commission should forbear from the imposition of such obligations on providers of telecommunications infrastructure or bulk capacity to other carriers. As noted above, there is no reason to assess a contribution requirement on these entities because support obligations will, by definition, be levied on the actual telecommunications service providers that are offering service to the public. More importantly, extending universal service obligations to providers of infrastructure or wholesale capacity could actually be counterproductive to the goal of advancing universal service since it could create a disincentive for non-telecommunications carriers to continue to develop and provide access to their telecommunications infrastructure.

C. Exempt Carriers Or Classes Of Carriers

The Act empowers the FCC to exempt a carrier or class of carriers from the obligation to make contributions towards universal service if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to preservation and advancement of universal service would be *de minimis.* The FCC seeks input on the establishment of rules to exempt very small communications

providers. UTC urges the FCC to clarify that eligibility for the exemption should be based on the size of the telecommunications service offering rather than the overall size of the parent entity.

II. Assessment of Contributions

Consistent with the Act's dictate that "a telecommunications carrier shall be treated as a common carrier to the extent that it is engaged in providing telecommunications services," the FCC should only assess universal service support obligations on an entity to the extent that it offers telecommunications services.

Among the various Commission proposals for assessing the universal service contribution for individual telecommunications service providers, UTC considers an assessment based a percentage of gross interstate telecommunications revenues net of payments to other telecommunications carriers to be the most equitable. Above all, the contribution rules should be flexible and recognize that telecommunications service providers may be able to advance the goals of universal service in ways other than direct financial payments. For example, the rules should allow for contributions in the form of the provision of service to schools, hospitals and state and local public safety agencies, to offset assessments.

III. Conclusion

A growing number of utilities and pipelines have expressed a strong interest in actively providing telecommunications services and products. To the extent that utilities and pipelines enter into the provision of such telecommunications services they fully expect to be subject to the Act's universal service provisions in the same manner as other similarly situated carriers. Indeed, UTC is confident that if the Commission properly structures its rules, the utility industry can play a significant role in the deployment of telecommunications infrastructure and the advancement of universal service.

However, in drafting its universal service obligations the FCC must be careful not to adopt overly broad contribution requirements that could have the unintended consequence of creating a disincentive for continued utility provision of telecommunications infrastructure. Specifically, UTC considers it premature for the Commission to extend universal service contribution requirements to non-telecommunications service providers, including entities that operate as infrastructure providers or carrier's carriers but which do not themselves directly offer service to the public.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

UTC

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